

84-786

No. \_\_\_\_\_

Office - Supreme Court, U.S.

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ALEXANDER L. STEVENS

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

STATE OF MAINE,  
Petitioner

V.

PERLEY MOULTON, JR.,  
Respondent

ON WRIT OF CERTIORARI TO THE  
SUPREME JUDICIAL COURT OF THE  
STATE OF MAINE

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Sixth Amendment right to counsel is violated under Massiah v. United States, 377 U.S. 201 (1964), and United States v. Henry, 447 U.S. 264 (1980), where, in the course of a good faith investigation of crimes for which a defendant has not yet been charged, the police unintentionally obtain in the absence of counsel the defendant's incriminating statements about crimes for which he has already been charged?

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#### OPINIONS BELOW

The opinion of the Supreme Judicial Court of Maine in State of Maine v. Perley Moulton, Jr., Decision No. 3584, Law Docket No. Wal-83-401 (Decided August 16, 1984), which held that the police violated Mr. Moulton's Sixth Amendment right to counsel, is published at 481 A.2d 155 (Me. 1984) and is reproduced in Appendix A to this petition. The Maine Superior Court order finding no violation of Mr. Moulton's Sixth Amendment right to counsel is reproduced in Appendix B to this petition.

#### JURISDICTION

The judgment of the Supreme Judicial Court of Maine in State of Maine v. Perley Moulton, Jr., Decision No. 3584, Law Docket

No. Wal-83-401 (Decided August 16, 1984), was entered on August 16, 1984, and the Court's mandate issued the same day. The sixty-day period provided in U.S. Sup. Ct. Rule 20.1 for filing a certiorari petition would have ended on October 15, 1984. Pursuant to Rule 20.1, Mr. Justice Brennan, by order dated October 11, 1984, extended the State's time for filing its petition for certiorari by 30 days to and including November 14, 1984.

Petitioner State of Maine invokes the jurisdiction of the Supreme Court of the United States pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the Constitution  
of the United States:

In all criminal  
prosecutions, the accused  
shall enjoy the right to a  
speedy and public trial,  
by an impartial jury of  
the State and district  
wherein the crime shall  
have been committed, which  
district shall have been  
previously ascertained by  
law, and to be informed of  
the nature and cause of  
the accusation; to be  
confronted with the  
witnesses against him; to  
have compulsory process  
for obtaining witnesses in  
his favor, and to have the  
Assistance of Counsel for  
his defense.

STATEMENT OF THE CASE

On April 7, 1981, a Waldo County grand  
jury indicted Perley Moulton, Jr., and Gary  
Colson on three felony counts of theft by

receiving two stolen trucks and stolen auto parts and also a misdemeanor count of theft by receiving a stolen automobile.

On November 4, 1982, Gary Colson met with Robert Keating, Chief of the Belfast City Police Department, to complain that he (Colson) had been receiving threatening telephone calls. App. A at 9-10; App. B at 43-44. On November 6, 1982, Colson met with Respondent Moulton, who revealed his plans to kill Gary Elwell, a State's witness in the criminal case against Moulton and Colson. App. A at 10; App. B. at 44-45. Moulton told Colson that he would telephone Colson later to finalize plans for killing Gary Elwell. (S.H.T. at

26 (Colson); 51 (Keating)).<sup>1</sup>

On November 9 and 10, 1982, Colson again met with police officers who questioned Colson concerning the crimes with which he had been charged. Colson also discussed the threats he had been receiving and Moulton's plan to kill Gary Elwell. App. A at 10; App. B. at 45. Other witnesses in the case, including Gary Elwell, also reported to Chief Keating that they had been threatened either in-person by Perley Moulton or over the telephone. (App. A at 10; S.H.T. at 57-58, 62-63 (Keating)).

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<sup>1</sup> References to pages of the court reporter's transcript (M.R. Crim. P. 39(b)) of the hearing held June 1, 1983, in Maine Superior Court (Waldo County) on Mr. Moulton's motion to suppress his post-indictment statements to Gary Colson shall be in parentheses as follows: (S.H.T. at \_\_\_\_).



On November 12, 1982, Chief Keating gave Colson a recording device to be installed on Colson's telephone. (App. A at 10; App. B at 45; S.H.T. at 50 (Keating)). Between November 21st and approximately Christmas Day of 1982, Colson recorded three telephone conversations initiated by Moulton and turned over the tapes to the police.<sup>2</sup> App. A at 10; App. B. at 45-46. In the last telephone conversation, Moulton told Colson that he planned to meet with Colson at Colson's home on December 26, 1982. App. A at 10-11; App. B at 45.

For this meeting, the police equipped Colson with a body wire transmitter so that the police could listen to and record the

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<sup>2</sup> The recordings of the three Moulton-Colson telephone conversations were not offered at trial.



meeting. The officers' two reasons for the body wire were 1) to protect Colson in the event that Moulton already realized, or should learn in the meeting, that Colson had become a police informant, and 2) to learn more about Moulton's plans for killing and tampering with witnesses. App. A at 11, 13; App. B at 45-46. The police instructed Colson not to question Moulton in their meeting, to avoid trying to draw information out of Moulton, to converse normally, and that he (Colson) could agree or disagree with anything Moulton said. App. A at 16; App. B at 46. Chief Keating was also aware that Moulton and Colson "would probably talk about everything and anything," including the criminal cases where Moulton was already under indictment. App. A at 15; App. B at 46.

In the meeting, Moulton brought up subjects for discussion, and then Colson discussed the subjects with him. (S.H.T. at 38-40 (Colson)). Much of the discussion focused on Moulton's plans for their defense at their upcoming trial on the crimes for which they had already been indicted. During the conversation Moulton made several incriminating statements that were later used against him at trial. App. A at 11.

On April 13, 1983, Respondent Moulton filed in Maine Superior Court (Waldo County) a pre-trial motion to suppress his statements to Colson in the three telephone conversations and the December 26th meeting. The motion was expressly based on the Fifth, Sixth, and Fourteenth Amendments

to the United States Constitution and Me. Const. art. I, § 6. At the suppression hearing, Respondent abandoned his Miranda-based Fifth Amendment challenge to the statements' admissibility, claiming only that the statements were obtained in violation of Moulton's right to counsel under the Sixth Amendment and Me. Const. art. I, § 6. (S.H.T. at 19-19A).

In an "Opinion and Order" filed June 20, 1983, the Suppression Hearing Justice denied Moulton's motion to suppress on the basis of Sixth Amendment law without ever discussing Me. Const. art. I, § 6. The Justice specifically found that Respondent's three telephone conversations and one "body wire" conversation with Colson were recorded for legitimate purposes not

related to the gathering of evidence concerning the crime for which the defendant had been indicted. Testimony shows that the recordings were made in order to gather information concerning the anonymous threats that Mr. Colson had been receiving, to protect Mr. Colson and to gather information concerning defendant Moulton's plans to kill Gary Elwell.

App. B at 48-49. Citing Massiah v. United States, 377 U.S. 201 (1964), and United States v. Henry, 447 U.S. 264 (1980), the Justice ruled that the police here did not "deliberately elicit" or "create a situation likely to induce" Moulton's post-indictment incriminatory statements in the absence of counsel. App. B at 49.

Following his conviction in a jury-waived trial in Maine Superior Court

(Waldo County),<sup>3</sup> Respondent appealed to the Maine Supreme Judicial Court, alleging, inter alia, that the manner in which the police made the body wire recording of his conversation with Colson violated the Sixth Amendment.<sup>4</sup> On review, the Maine Supreme

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<sup>3</sup> Respondent was convicted of Class B and Class C theft (17-A Maine Revised Statutes Annotated (M.R.S.A.) § 353 (1983)) and Class C burglary (17-A M.R.S.A. § 401 (1983)). These crimes were charged in two indictments (Superior Court Docket Nos. CR-83-13 and CR-83-16) out of seven indictments returned by a Waldo County grand jury on January 21, 1983. Since these seven indictments covered the incidents alleged in the original indictments dated April 7, 1981, as well as several new charges, the original indictments against Moulton were subsequently dismissed.

<sup>4</sup> Respondent's appeal from his judgments of conviction in Superior Court Docket Nos. CR-83-13 and CR-83-16 was assigned Law Docket No. Wal-83-401 in the Maine Supreme Judicial Court. The State's appeal from the dismissal on venue grounds of three other indictments against Respondent was assigned Law Docket No. Wal-84-361. The two appeals were decided



Judicial Court found ample evidence to support the finding below that the body wire recording was made "for legitimate purposes not related to the gathering of evidence concerning the crime for which the defendant had been indicted." App. A at 12-13. However, the Court also stated that because Moulton and Colson were friends and codefendants

the police knew, or should have known, that Moulton likely would make

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together in State v. Moulton, Decision No. 3584, 481 A.2d 155 (Me. 1984), which, inter alia, vacated on Sixth Amendment grounds the Superior Court's judgments of conviction in Docket Nos. CR-83-13 and 16. The State is filing this petition for certiorari relative to the Maine Supreme Judicial Court's treatment of the Sixth Amendment issue in Law Docket No. Wal-83-401.

incriminating statements  
at the meeting that Colson  
recorded.

App. A at 15; State v. Moulton, 481 A.2d  
155, 160 (Me. 1984). On this basis, the  
Maine Supreme Judicial Court held that the  
police here violated Henry and Massiah and  
that therefore the Suppression Hearing  
Justice erred in not granting Respondent's  
motion to suppress.

REASON FOR GRANTING THE WRIT

THE MAINE SUPREME JUDICIAL COURT HAS  
DECIDED AN IMPORTANT QUESTION OF SIXTH  
AMENDMENT LAW IN A WAY THAT CONFLICTS  
WITH THIS COURT'S DECISIONS IN MASSIAH  
V. UNITED STATES, BREWER V. WILLIAMS,  
AND UNITED STATES V. HENRY.

In Massiah v. United States, 377 U.S.  
201 (1964), and Brewer v. Williams, 430  
U.S. 387 (1977), this Court held that the  
Sixth Amendment prohibits police



investigatory activities done with the specific intent of extracting from a person in the absence of counsel information about crimes for which he has already been indicted or otherwise charged. See United States v. Henry, 447 U.S. 264, 280 (1980) (Blackmun, J., dissenting). In United States v. Henry, 447 U.S. 264 (1980), this Court affirmed the Massiah rule but sharply divided over whether the facts in Henry constituted a violation of Massiah.

The Maine Supreme Judicial Court's decision in Moulton, finding a Sixth Amendment violation even where the police were not intending to gather evidence of the crimes for which Respondent had been indicted, exposes for consideration the issue in Henry that prompted Justice Powell to write in concurrence and Justice Blackmun joined by Justice White to dissent

- viz., that Henry would be misread so that courts such as the Maine Court would find Sixth Amendment violations in the absence of deliberate, intentional, or purposeful police efforts to obtain post-indictment incriminatory statements.

In Henry, the majority opinion found a Massiah violation in the government's use of an undisclosed informant who was to be paid only if he obtained incriminating statements from Henry, a fellow prisoner awaiting trial. Henry, 447 U.S. at 270. This contingent-fee arrangement meant that the government "must have known" that the paid informant "would take affirmative steps" to elicit information from Henry about the crime for which he had already been indicted, despite the government's

instructions not to question Henry. Henry, 447 U.S. at 271. Justice Powell joined the Court's opinion but wrote separately to emphasize that the Court's holding held true to the Massiah rule, i.e., that the paid informant in Henry did deliberately elicit incriminating information from Henry in violation of Massiah.

Joined by Justice White, Justice Blackmun dissented, objecting that while the majority claimed to retain Massiah's "deliberately elicited" test, the Court was really forging

a new test that saps the word "deliberately" of all significance. The Court's extension of Massiah would cover even a "negligent" triggering of events resulting in reception of disclosures.

Henry, 447 U.S. at 279.<sup>5</sup>

In the instant case, the Maine Supreme Judicial Court misread the majority opinion in Henry in precisely the way that the Henry concurring and dissenting opinions feared. The Maine Court first expressly affirmed the lower court finding that the police body-wired the informant "'for legitimate purposes not related to the gathering of evidence concerning the crime for which the defendant had been indicted.'" App. A at 12-13 (quoting App. B at 48). The Court recognized that the body wire was to protect the informant and

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<sup>5</sup> In a separate dissent Justice Rehnquist argued that Massiah should be overruled and that, in any event, the majority erred in finding that the government had "deliberately elicited" statements from Henry.

investigate threats made against other State's witnesses in the case against Moulton. App. A at 13. The Maine Court then focused, however, on the facts that Moulton and the informant were friends and codefendants and that, on this basis, "the police knew, or should have known, that Moulton likely would make incriminating statements [about the crimes for which he had already been indicted] at the meeting that Colson recorded." App. A at 15. Because it was foreseeable that Moulton would make incriminating statements, the Court ruled that the police's placing of the body wire on Colson, which would record anything Moulton said at their meeting, violated Massiah and Henry.



The unifying theme of Henry, Brewer v. Williams, and Massiah is "the presence of deliberate, designed, and purposeful tactics, that is, the agent's use of an investigatory tool with the specific intent of extracting information in the absence of counsel." See Henry, 447 U.S. at 280 (Blackmun, J., dissenting). By failing to use this "specific intent" standard and applying instead a test of whether Moulton's post-indictment incriminatory statements were foreseeable, the Maine Court misapprehended the import of Henry and the line of authority on which it is based.<sup>6</sup> This case presents this Court

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<sup>6</sup> The Maine Court's application of the wrong legal standard is significant in that, under the right standard, there was no Sixth Amendment violation because the

with the opportunity to clarify its decisions in this area by holding that police investigation where post-indictment incriminatory statements are foreseeable is not enough for a Sixth Amendment violation - viz., that what the Massiah-Henry rule

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Court's own finding of fact was that the police, in placing the body wire on Colson, had no specific intent to obtain Moulton's post-indictment incriminatory statements. Moreover, the pre-arranged presence of the body wire itself did not give Colson an incentive to elicit, in violation of police instructions, incriminating statements from Moulton about the crimes for which Moulton was already indicted, especially since the purpose of the body wire was to investigate Moulton's unindicted criminal activity. Further evidence of the absence of police elicitation or inducement is that Moulton himself initiated, arranged, and set the agenda for the December 26th meeting, in which Moulton made incriminating statements in the course of presenting his plans for their trial defense.



proscribes is police investigatory activities done with the specific intent of extracting from a person in the absence of counsel information about crimes for which

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The facts of this case are distinguishable from Massiah where the pre-arranged planting of a radio transmitter did give the codefendant-informant in that case, also named Colson, a reason to make sure that he followed the government agent's instructions to discuss with Massiah the crimes for which Massiah had been indicted. See Henry, 447 U.S. at 279 n.2 (Blackmun, J., dissenting). This case is also distinguishable from Henry where the contingent-fee arrangement meant that the government "must have known" that the paid informant "would take affirmative steps" to elicit information from Henry about the crime for which Henry had been indicted. Henry, 447 U.S. at 271.

he has already been indicted or otherwise charged.<sup>7</sup> See Henry, 447 U.S. at 280 (Blackmun, J., dissenting).

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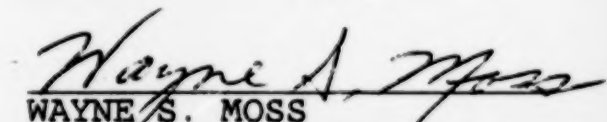
<sup>7</sup> The need for clarification in this area of Sixth Amendment law is illustrated by the direct conflict between the Maine Court's decision in Moulton and the First Circuit's decision in United States v. DeWolf, 696 F.2d 1 (1st Cir. 1982). On similar facts the First Circuit reached the opposite result.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Maine Supreme Judicial Court in State of Maine v. Perley Moulton, Jr., 481 A.2d 155 (Me. 1984).

Respectfully submitted,

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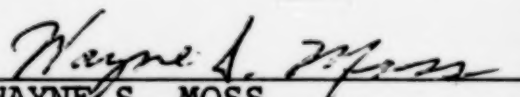
Dated: November 13, 1984

CERTIFICATE OF SERVICE

I, Wayne S. Moss, Assistant Attorney General, hereby certify that pursuant to U.S. Sup. Ct. Rule 28.3 I have caused three (3) copies of the foregoing "Petition for a Writ of Certiorari" to be served on the only other party to this proceeding by depositing said copies in the United States Mail, postage prepaid, addressed to Respondent's Counsel of Record, Anthony W. Beardsley, Esquire, as follows:

Anthony W. Beardsley, Esquire  
SILSBY & SILSBY  
Silsby Building  
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Dated at Augusta, Maine, this 13th day of November, 1984.

  
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Petitioner

APPENDIX A

MAINE SUPREME JUDICIAL COURT

Reporter of  
Decisions  
Decision No.  
3584  
Law Docket  
Nos.  
Wal-84-361  
Wal-83-401

STATE OF MAINE

v.

PERLEY MOULTON, JR.

Argued May 10, 1984  
Decided August 16, 1984

Before McKUSICK, C.J., and NICHOLS,  
ROBERTS, WATHEN, GLASSMAN, and SCOLNIK, JJ.

McKUSICK, C.J.

Defendant Perley Moulton, Jr. appeals from his convictions for theft, 17-A M.R.S.A. § 353 (1983) (Class B), burglary, 17-A M.R.S.A. § 401 (1983) (Class C), and theft, Class C, entered after a jury-waived trial in Superior Court (Waldo County). Defendant argues that the Superior Court erred by admitting in evidence 1) the

results of a search of the garage premises in Belfast used by defendant and 2) a recording made by the police of defendant's conversations with a co-defendant who was wearing a body wire transmitting device. We reject his appeal as to the search and seizure issue, but agree that the Superior Court should have excluded the evidence obtained by the body wire recordings.

The State appeals from orders of the Superior Court that dismissed three counts of theft against Moulton for lack of proper venue. We agree with the State and remand those counts of theft for restoration to the docket.

In April 1981, a Waldo County grand jury indicted Perley Moulton and Gary Colson on three felony counts of theft by receiving two trucks and some auto parts, in addition to a misdemeanor count of theft by receiving an automobile. Moulton moved to suppress



evidence seized as a result of a search of the garage premises formerly occupied by the auto dealership of Belfast Dodge. By order dated February 11, 1982, the Superior Court denied the motion to suppress as to most of the items involved.

During November and December 1982, meetings were held between co-defendant Gary Colson and Belfast police officers which resulted in a tap being placed on Colson's phone and a wire placed on his body to transmit an in-person conversation Colson had with Moulton. The recordings from the body wire produced additional evidence later used against Moulton.

<sup>1</sup> By decision dated September 9, 1981, a Superior Court justice decided this suppression motion. The parties, however, were unable to obtain a transcript of that suppression hearing and a new hearing was held. The order stemming from the first hearing has delayed no role in subsequent proceedings.



On January 21, 1983, a Waldo County grand jury handed down seven indictments against Moulton. Since the new indictments covered the incidents alleged in the original indictments as well as several new charges, the original indictments against Moulton were subsequently dismissed. Moulton moved to suppress the statements recorded by Gary Colson and again moved to suppress the evidence seized as a result of the search at Belfast Dodge. On June 14, 1983, a different Superior Court justice denied the motion as to the statements made to Colson, and on September 2, 1983, that justice denied the motion as to the Belfast Dodge search on the ground that the issue had already been decided in the February 11, 1982, order.

The seven indictments were disposed of as follows. The Superior Court accepted

defendant's guilty pleas on two indictments for theft (Docket Nos. CR-83-10, 11). Without trial, the court dismissed two indictments for theft (Docket Nos. CR-83-12, 14) for improper venue. On September 6-8, 1983, a jury-waived trial on all the other indictments was held in Superior Court. At the conclusion of the trial, on motion of defendant's counsel, the court dismissed one of the indictments for theft for improper venue (Docket No. CR-83-15). Defendant was found guilty of both theft and burglary (Class C) as charged in two counts in Docket No. CR-83-13 and of theft (Class B) as charged in Docket No. CR-83-16, and he now appeals those convictions. The court found defendant not guilty of the arson charge (Docket No. CR-83-16).

I. State's Appeal: Venue

The three indictments dismissed on venue grounds involved similar fact patterns. In each, the indictment charged that Moulton "did obtain or exercise unauthorized control over the property of another," to wit, three motor vehicles. Moulton allegedly took each vehicle in Penobscot County and brought them into Waldo County.

These indictments track the language of 17-A M.R.S.A. § 353 (1983), which provides:

A person is guilty of theft if he obtains or exercises unauthorized control over the property of another with intent to deprive him thereof.

The Superior Court ruled that, in each case, a completed theft under section 353 occurred prior to the time Moulton brought the vehicles into Waldo County. The crime defined in section 353, however, has a continuing nature and Moulton would continue

in violation of section 353 when he took a stolen vehicle into another county. See Crosby v. State, 232 Ga. 599, 600, 207 S.E.2d 515, 517 (1974); Brown v. State, 281 So. 2d 924, 927 (Miss. 1973). As we said in Mayo v. State, 258 A.2d 269, 270 (Me. 1969), "[i]f goods are stolen in one county and carried by the thief into another county, he may be prosecuted for the crime in either county." In such circumstances, the crime of theft is committed in both counties and, by M.R. Crim. P. 18, the State may choose<sup>2</sup> the county in which to prosecute. People v. Jennings, 10 Cal. App. 3d 712, 89 Cal. Rptr. 268 (1970); State v. Bassett,

<sup>2</sup> We also note--as we did in State v. Terrio, 442 A.2d 537, 540 n.5 (Me. 1982) --that we are aware of no case since the 1930 creation of a single, state-wide Superior Court which has held that a variance in proof of venue as opposed to jurisdiction is fatal.

86 Idaho 277, 284-85, 385 P.2d 246, 250 (1963); Jones v. Commonwealth, 453 S.W.2d 564 (Ky. 1970); 22 C.J.S. Criminal Law § 185(18), at 480 (1961).

We therefore sustain the State's appeal of the dismissal of the three charges of theft for want of proper venue. As a consequence, we remand those cases to the Superior Court for further proceedings. There is no double jeopardy problem with a retrial in Docket No. CR-83-15, which was dismissed at the conclusion of trial. The Superior Court ordered dismissal of that charge on defendant's motion. Before granting defendant's motion the Superior Court made certain that defendant and his counsel understood that dismissal would render defendant subject to prosecution on the same charge in Penobscot County. By seeking dismissal, defendant must run the



risk that the State might prevail on appeal, thereby permitting a retrial. See United States v. Scott, 437 U.S. 82, 99-100 (1978) (dismissal after full trial, on the defendant's motion, for pre-indictment delay).

## II. Defendant's Appeal

### A. Recorded Statements

At trial the State introduced in evidence a recording of a conversation between co-defendants Gary Colson and Perley Moulton. The Superior Court, in a pretrial suppression hearing, had found that the manner in which the police made this recording did not violate Moulton's sixth amendment right to counsel. We reverse.

On November 4, 1982, Gary Colson called Police Chief Keating and said that he had been receiving threats regarding the criminal charges pending against Colson and



Moulton. On November 6, 1982, Colson met with Moulton, at which meeting Moulton allegedly revealed his plans to kill Gary Elwell, a State's witness. Twice within the next four days, Colson met with Chief Keating and Officer Rexford Kelley. Colson discussed the threats he had received from someone other than Moulton, as well as Moulton's plans to kill Elwell and to threaten other witnesses. Chief Keating had previously been informed that other witnesses in the Moulton case had reported receiving threatening phone calls. With Colson's consent, Chief Keating placed a recording device on Colson's phone. Colson recorded three telephone conversations he had with Perley Moulton. Gary Colson

<sup>3</sup> The recordings of the three Colson-Moulton telephone conversations were the subject of a suppression motion, which was denied, but the recordings were not offered at trial.

also arranged to meet Moulton in late December, 1982. In preparation for this meeting, Chief Keating provided Colson with a body wire transmitter. By Colson's use of the body wire, the police were able to record Colson's conversation with Moulton. That lengthy conversation focused on the upcoming trial on the charges against Moulton and Colson. During the conversation Moulton made several incriminating statements that were later used against him at trial.

The sixth amendment requires suppression of an accused's statement if, after the initiation of adversary proceedings, the State, or its agent, has deliberately elicited an incriminating statement, see Massiah v. United States, 377 U.S. 201, 206 (1964), or the State has intentionally created a situation "likely to induce a

defendant to make incriminating statements," see United States v. Henry, 447 U.S. 264, 274 (1980); State v. White, 460 A.2d 1017, 1021 (Me. 1983). The Superior Court found that the State did not deliberately elicit or create a situation likely to induce Moulton to make incriminating statements. On appeal, the justice's ruling on this issue "will be upheld if 'the evidence in the record provides rational support for the conclusions he reached'." Id. (quoting State v. Bleyl, 435 A.2d 1349, 1358 (Me. 1981)).

In its ruling the Superior Court focused upon the motives of the Belfast police officers who dealt with Colson in setting up the body wire recording system. The Superior Court found that the recordings were made "for legitimate purposes not related to the gathering of evidence

concerning the crime for which the defendant had been indicted." On our review, we find ample evidence that supports this conclusion. Chief Keating was concerned about Colson's safety and about gathering information relating to possible threats made against other witnesses in the case against Moulton.

Although, as the police knew, Moulton was represented by counsel and had exercised his right to remain silent, the police were free to gather information via the body wire regarding possible crimes, such as the threats against witnesses, not already the subject of judicial proceedings. See United States v. DeWolf, 696 F.2d 1 (1st Cir. 1982). However, the State's valid purpose in investigating other criminal activity cannot remove from constitutional scrutiny evidence thereby uncovered that relates to

alleged criminal acts for which the right to counsel has already attached. As explained in Massiah:

We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his trial.

377 U.S. at 207 (emphasis in original).

Reference to the State's legitimate motive may be relevant to, but cannot wholly refute, the alleged infringement of Moulton's right to counsel. The State cannot use at trial against Moulton the



fruits of such recording devices where the State should have known that the situation it intentionally created would likely induce Moulton to make incriminating statements.

See Henry, 447 U.S. at 271.

The record plainly reveals that the police knew, or should have known, that Moulton likely would make incriminating statements at the meeting that Colson recorded. As the Superior Court found, "Chief Keating admitted that by this time [just prior to the Colson-Moulton conversation] he was aware that Colson and Moulton [co-defendants in a multi-count criminal prosecution] would probably discuss their upcoming case at the meeting." The fact that Moulton and Colson were friends and co-defendants was of central importance in this case. That close relationship significantly increased the chance, as Chief



Keating should have known, that Moulton would confide incriminating information to Colson. A defendant's normally cautious approach to dealing with government agents is replaced by an "off-guard" openness when dealing with an undisclosed police informant. Moulton "was more seriously imposed upon because he did not know that his co-defendant was" working with the police. Henry, 447 U.S. at 273; see Massiah, 377 U.S. at 206; Malone v. State, 390 So. 2d 338 (Fla. 1980), cert. denied, 450 U.S. 1034 (1981).

The Superior Court found that "Colson was told to try to act like himself, converse normally, and avoid trying to draw information out of Moulton." Even granting that this is an accurate characterization of Colson's mission, this finding in no way suggests that Chief Keating should not have

expected Moulton to incriminate himself. Whether or not Colson intended to question him, or merely engage in conversation, the fact that the conversation would concern the pending charges made it likely that Moulton would incriminate himself. In Henry, an informant contacted the police, who advised him "to be alert to any statements made by the federal prisoners, but not to initiate any conversation with or question Henry regarding the bank robbery." 447 U.S. at 266. Notwithstanding this finding, the Supreme Court concluded that Henry's statements were obtained in violation of his right to counsel. A review of the transcript of the Colson-Moulton meeting makes clear that Colson was not merely a "passive listener." See United States v. Franklin, 704 F.2d 1183 (10th Cir. 1983). Instead, Colson frequently pressed Moulton

for details of various thefts and in so doing elicited much incriminating information that the State later used at trial. This is precisely what Chief Keating should have anticipated. His advice to Colson to avoid actively questioning Moulton is an insufficient protection where Colson and Moulton were planning to discuss the upcoming criminal trial. By the time the body wire was placed on him, Colson was fully cooperating with the police and no longer stood in the same adversarial position as did Moulton.

When the police recommended the use of the body wire to Colson they intentionally created a situation that they knew, or should have known, was likely to result in Moulton's making incriminating statements during his meeting with Colson. The police's valid purpose in investigating

threats against witnesses does not immunize the recordings of Moulton's incriminating statements from constitutional attack. Those statements may be admissible in the investigation or prosecution of charges for which, at the time the recordings were made, adversary proceedings had not yet commenced. But as to the charges for which Moulton's right to counsel had already attached, his incriminating statements should have been ruled inadmissible at trial, given the circumstances in which they were acquired.

B. Search and seizure issues

Although we vacate defendant's three convictions because of the erroneous admission of the body wire recording and so have no necessity of addressing the search and seizure issues, we do so for purposes of judicial economy because the issues are

likely to arise on retrial. See, e.g.,  
State v. Therriault, \_\_\_ A.2d \_\_\_ (Me. 1984);  
Cutillo v. Gerstel, \_\_\_ A.2d \_\_\_ (Me. 1984);  
Boston Milk Producers, Inc. v. Halperin, 446  
A.2d 33, 37 (Me. 1982).

1. Prior adjudication

Moulton argues that the Superior Court  
erred in its order dated September 2, 1983,  
that Moulton was not entitled to relitigate  
the search and seizure issues. The Superior  
Court justice concluded that:

Since the present motion  
addresses the same  
search, the same  
evidence, and the same  
defendant and counsel,  
the fact that the  
defendant has been  
reindicted under a  
different theory of theft  
does not warrant a new  
hearing and order  
concerning the  
admissibility of the same  
evidence against him.

On February 11, 1982, the Superior Court fully considered the arguments relating to the evidence obtained in the search at Belfast Dodge. In a separate proceeding between the same parties, collateral estoppel bars relitigation of issues that were actually litigated in the first proceeding. Restatement (Second) of Judgments, § 27 (1982). This principle is unquestionably a part of the criminal law. Ashe v. Swenson, 397 U.S. 436, 442 (1969); State v. Spearin, 463 A.2d 727, 729-30 (Me. 1983) (applying Ashe); see 21 Am. Jur. 2d Criminal Law § 321 (1981).

The fact that Moulton was reindicted on different theories of theft and additional charges of burglary and arson does not invalidate the prior order made when the State had indicted Moulton only for receiving stolen goods. These changes in



the indictments did not prejudice Moulton's rights in seeking suppression of the fruits of the search and seizure. The charges Moulton faced at the time of the earlier hearing were sufficiently serious that he "had every incentive to litigate" at that hearing "fully and vigorously." Parklane Hosiery v. Shore, 439 U.S. 322, 332 (1979). The new charges did not change any of the issues that would be addressed if the Superior Court had given Moulton yet another suppression hearing. The search at Belfast Dodge was valid or invalid irrespective of the charges on which the State ultimately proceeds. As we discuss below, the probable cause and exigency issues must be resolved based upon facts known to the police at the time of the search. See State v. Fillion, 474 A.2d 187, 189 (Me. 1984). On appeal, defendant's attack must concentrate upon the

Superior Court's February 11, 1982, order denying his suppression motion.

2. Standing

The State argues on appeal that Moulton lacks standing to challenge the validity of the search and seizure at Belfast Dodge. The Superior Court rejected the State's argument, finding that Moulton had a legitimate expectation of privacy in the premises. See Rakas v. Illinois, 439 U.S. 128, 140-41 (1978). The facts of record provide ample support for the Superior Court's conclusion.

Donald Marcia operated the Belfast Dodge dealership until he went out of business at some time prior to January, 1981. At the request of Chrysler Credit Corporation, Marcia maintained a presence at Belfast Dodge to deter vandalism. He used the main building and rented the service bays at the

rear to defendant Perley Moulton, his son-in-law. Moulton, and not Marcia, had the keys to the service bay door locks. Moulton was using the service bays to work on motor vehicles. On these facts, the Superior Court committed no error in concluding that Moulton had enough of an interest in controlling access to the service bays to give him standing to challenge the warrantless search.

3. Probable cause

On December 4, 1980, the Belfast police were informed that auto parts and a pickup truck had been stolen from Lothrop Ford the previous night. The truck was recovered from a lake later that same day. At some later time prior to January 15, 1981, the police received an anonymous tip that the stolen parts could be found at Belfast Dodge.

On January 14, 1981, Richard Fairbrother reported to the Belfast Police Department that one of his dump trucks had been stolen. When Officer Richard Rumney reported to work at the Belfast Police Department at 4:00 p.m. on January 15, 1981, he was told that the police had received an anonymous phone call advising the department that they could find the Fairbrother dump truck at Belfast Dodge. Officer Rumney went to visit Marcia at Belfast Dodge. The Belfast Dodge complex consists of a main building previously used as a showroom and a second building, back from the highway, containing six service bays. Marcia said he could not authorize a search of the service bays. At that time Rumney conducted a search limited to the main building but found nothing.

Officer Rumney continued on his patrol duties until he received a radio call at 11:00 p.m. directing him to a fire near the former Knights of Columbus Hall located in a wooded area off Route 137. Upon reaching the fire scene, which was about a quarter mile from Belfast Dodge, Rumney found a dump truck fitting the description of that stolen from Fairbrother engulfed in flames. Rumney noted that various parts of the truck, such as its fenders, hood, doors, radiator, and so-called West Coast mirrors, had been removed.

Rumney followed the tire tracks from the truck back about 100 feet to Route 137 where the trail ended because the pavement was dry. Officer Raymond Meder, who joined Rumney at the scene, followed footprints in the snow leading away from the fire out to Route 137 and then along the side of that



highway for about a mile in the direction away from Belfast Dodge. These footprints ended at the intersection of Route 137 and Shepherd Road, suggesting that the person making the prints had been picked up by a motorist.

Rumney returned to the Belfast Dodge complex. In the snow on the small road next to the body shop he saw truck tire tracks that resembled those of the Fairbrother truck. The tracks ended in front of bay number four. Rumney saw that bay four was dark, but the first three bays were lighted. Two other bays are located around to the back. As Rumney opened the door to bay four he heard a hissing sound. Rumney entered bay four, discovered that the hissing sound came from an air wrench, and found tools and auto parts that resembled corresponding parts of the Fairbrother truck.



Officer Meder arrived and together with Rumney searched various bays of the body shop. They found no suspects but did find auto parts resembling those reported stolen from Lothrop Ford. Police Chief Keating arrived and, with the help of a Lothrop Ford employee, assisted the other officers in seizing and identifying auto parts. The police posted a guard and, on the basis of the information gained from the initial entry, obtained a search warrant. Armed with that warrant, they seized more tools, auto parts, and a pickup truck.

The Superior Court found that the warrantless search of the premises for a suspect was justified under the exigent circumstances exception to the fourth amendment. To justify such a search, the police must have had both probable cause to believe that a criminal suspect was on the

premises as well as an exigency that precluded them from securing the premises long enough to obtain a search warrant. See State v. Libby, 453 A.2d 481, 484 (Me. 1982); State v. Blais, 416 A.2d 1253, 1256 (Me. 1980). The Superior Court found that "probable cause for a search of the premises for suspects existed in this case." This finding is entitled to deference on appellate review and should be reversed only if "clearly erroneous." See State v. Smith, 379 A.2d 722, 724 (Me. 1977). Such an error exists only if there is no competent evidence to support the Superior Court's conclusion. In addition to facts explicitly found by the Superior Court, we must assume that the Superior Court made all of the findings necessary to its decision. See State v. Walker, 341 A.2d 700, 702 (Me. 1975).

We have held that

Probable cause to search exists when the officers' personal knowledge of facts and circumstances, in combination with any reasonably trustworthy information conveyed to the police, would warrant a prudent person believing that the search would disclose criminal conduct or items that would aid in identifying a criminal or establishing the commission of a crime.

State v. Smith, 379 A.2d at 724. The facts known to the investigating officers gave them ample cause to search the Belfast Dodge complex. The anonymous tips would be of limited import on their own. See Illinois v. Gates, 51 U.S.L.W. 4709, 4713 (1983). By the time of the search, however, the police had discovered substantial information to corroborate the second tip. See Draper v. United States, 358 U.S. 307 (1959); State v.

Blais, 416 A.2d at 1256. On answering the call to the fire, the police discovered Fairbrother's truck. Also, they observed that the truck had been dismantled in a manner that suggested the thief had the use of tools such as those that would be found in a body shop. The location of the truck only a quarter of a mile from the Belfast Dodge complex provided additional support for the conclusion that the informant was correct in telling the police that the truck had at one time been taken to Belfast Dodge. The tire tracks in front of bay four were, in the opinion of Officer Rumney, similar to those that would be made by the tires on the Fairbrother truck. See State v. Heald, 314 A.2d 820, 825 (Me. 1973) (analysis of tracks in snow can be important in establishing probable cause). These facts, along with the tip received by the

police linking Belfast Dodge with the theft of auto parts from Lothrop Ford, gave the officers sound reason to suspect that continuing criminal activity relating to motor vehicles and parts was associated with those premises.

In addition to the ever-present possibility that a suspect will be at his base of operations, several facts known to the investigating officers support the Superior Court's finding that probable cause existed to believe that one or more suspects were on the premises at the time of the search. Although the footprints at the site of the burning Fairbrother truck led away from Belfast Dodge, Officer Meder discovered that they ended along the road, indicating that the person responsible for the fire had been picked up by a motorist. Given the relatively short distance involved, the



police could fairly conclude that this suspect had circled back to Belfast Dodge prior to Officer Rumney's arrival there. The condition of the building indicated that someone may have been on the premises. The lights were still on in at least three of the service bays and some of the padlocks on the doors were left hanging in an unlocked position. These facts suggested to Officers Rumney and Meder that the building had not been locked up for the night but instead was still being used. Taking this information into account, the Superior Court found that, given the field experience of these officers, they had probable cause to believe that a criminal suspect was on the premises.

4. Exigent circumstances

Having probable cause to search, the officers were required to obtain a search warrant unless also there were present

exigent circumstances. Such circumstances exist where there is a compelling need to conduct a search and insufficient time in which to secure a search warrant. See Michigan v. Tyler, 436 U.S. 499, 509 (1978); State v. Johnson, 413 A.2d 931, 933 (Me. 1980). In exigent circumstances, to require the officers to delay the search until they have obtained a warrant "would have a strong likelihood of frustrating the fulfillment of the governmental interest conferring the probable cause to intrude upon the privacy of property." State v. Richards, 296 A.2d 129, 136 (Me. 1972); see also State v. Hassapelis, 404 A.2d 232, 236 (Me. 1979); State v. Barclay, 398 A.2d 794, 797 (Me. 1979). The officers' legitimate concern with apprehending a suspect, see Warden v. Hayden, 387 U.S. 294 (1967) (hot pursuit), is heightened in cases involving

particularly dangerous criminal activity. See State v. Johnson, 413 A.2d at 933 (apparently dead body on premises creates exigency); State v. Morse, 394 A.2d 285, 288 n.4 (Me. 1978) (exigency due to person acting wild in area near children); State v. Smith, 379 A.2d at 724 (dangerous suspect). To the officer's knowledge, the suspect or suspects in these crimes, in addition to stealing motor vehicles and parts, had driven one vehicle into a lake and had set another on fire.

The Superior Court found that "[i]t was not possible at that time, with only two officers present, to fully secure the premises while a warrant was obtained." See State v. Blais, 416 A.2d at 1257. "In determining whether exigent circumstances are present, the trial judge must use his own judgment, applied to the evidence before

him; we review his decision only for clear error." State v. Patten, 457 A.2d 806, 810 (Me. 1983). On the record before us we cannot find clear error in the Superior Court's finding of exigent circumstances. The Belfast Dodge complex is quite large. In addition to the main building, a service area is located some 100 feet away and to the rear. The service building consists of six bays, each large enough to hold a motor vehicle, and a seventh room, apparently once used as a bathroom. From what we can discern from the record and a chart introduced as an exhibit, four of the bays are lined up side-by-side. Bay five is behind the first four bays and has a door opening to the side, perpendicular to the line formed by the first four bays. Bay six is behind bays one and two, with a door that opens toward the side, in the opposite

direction of bay five. Thus, there are bays on three sides of the service area complex. Each bay has a door large enough for an automobile to pass through, and there are seven other smaller doors intended for human passage located around the complex. The officers had no way of knowing in which bay or room a suspect might be, and, without first entering the complex, could not know the extent to which a suspect could move around inside from bay to bay. We cannot assume that the officers could have quickly obtained a search warrant in the middle of the night in Belfast. Considering all of these facts, the size of the complex, the number number [sic] of possible exits, the danger posed by the suspect in an auto body shop where tools, vehicles, and flammable liquids would likely be found, and the time of the night, we find competent evidence to



support the Superior Court's conclusion that the officers, even with backup assistance, could not adequately secure the complex for the time it would take to obtain a search warrant. Compare McDonald v. United States, 335 U.S. 451, 455 (1948) (officers able to secure facilities), with State v. Smith, 379 A.2d at 725-26 (officers unable to secure facilities due to danger posed by suspect).

Since we conclude that defendant has failed to show any reversible error in the Superior Court's finding that the officers were justified in entering the building without a search warrant, we must conclude that the officers were entitled to seize the items they saw inside the service bays. The Superior Court found that those items were in plain view. see Coolidge v. New Hampshire, 403 U.S. 443, 465-66 (1971); State v. Mitchell, 390 A.2d 495, 499 (Me.

1978); and on appeal defendant does not challenge that finding. Therefore, not only were these original seizures without a warrant reasonable under the fourth amendment, but also the subsequent search warrant obtained in part on the basis of those items found in plain view was valid. The warrant was not tainted as the fruit of any illegal search.

5. Specificity of search warrant

Defendant's argument that the search warrant and accompanying affidavit in the case at bar did not sufficiently describe the place to be searched and items to be seized is without merit. A warrant adequately identifies the place to be searched if "the officers thereby are enabled to ascertain and identify the place intended by reasonable effort." State v. Brochu, 237 A.2d 418, 422-23 (Me. 1967)

(description of place "known as the dwelling of Armand A. Brochu" adequately describes house, garage, and outbuildings subject to search). The present warrant described with particularity the location of Belfast Dodge and identified the service bays as the area subject to search. Defendant's argument that the warrant did not specify which bays may be searched ignores the fact that the officers had cause to search any and all of the bays. Defendant further argues that the Superior Court should have suppressed all of the items seized pursuant to the search warrant as not having been sufficiently described in the warrant. The Superior Court granted the motion to suppress as to some items; as to the remaining items, we find no reversible error. The attached affidavit supplemented the description contained in the search warrant. See State

v. Corbin, 419 A.2d 362 (Me. 1980). That affidavit listed in detail the number and type of auto parts "stolen from Lothrop Ford in Belfast, Maine on 12/3/80 and body parts removed from a 1978 Maroon 65 series (2) ton Chevrolet dump truck stolen from Richard Fairbrother of Prospect, Maine." The affidavit contained descriptions such as "10 boxes of spark plugs, 1 R-27 Battery, 3 r-55 Batteries...." Under the circumstances, those descriptions were sufficiently detailed.

The entry is:

Superior Court's dismissal of the indictments in Docket Nos. CR-83-12, 14, and 15 vacated.

Superior Court's judgments of conviction in Docket Nos. CR-83-13 and 16 vacated.

Cases remanded to the Superior Court for further proceedings consistent with the opinion herein.

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All concurring.

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NOTICE: This opinion is subject to formal revision before publication in the Maine Reporter. Readers are requested to notify the Reporter of Decisions, Box 368, Portland, Me. 04112, of any typographical or other formal errors before the opinion goes to press.



APPENDIX B

STATE OF MAINE  
WALDO, SS.

SUPERIOR COURT  
Docket Nos.  
CR-83-10,11,12,  
13,14,15 and 16

Date of entry: June 20, 1983

STATE OF MAINE       )  
                          )  
                  V.       )  
                          )  
PERLEY MOULTON J.    )

OPINION AND ORDER

This matter is before the Court upon defendant's motion to suppress any and all statements made by the defendant, Perley Moulton, Jr., obtained directly or indirectly by law enforcement officials or their agents including Gary Colson.

FACTS

On November 4, 1982 Gary Colson called Chief Robert Keating of the Belfast Police Department to express his concern about threatening phone calls he had been receiving. At the time of the call, Mr.

Colson, along with co-defendant Perley Moulton, Jr., had been indicted by the Waldo County Grand Jury for three counts of felony theft and one count of misdemeanor theft. Both Colson and Moulton were represented by counsel and had exercised their right to remain silent. Later in the day Keating and Colson met in a remote area and discussed the anonymous threats Colson had been receiving. During the conversation Mr. Colson expressed an interest in telling Chief Keating about the incidents giving rise to the theft indictments, however Chief Keating told Colson to talk with his lawyer before revealing any information about those alleged criminal activities. On November 6, 1982 Mr. Colson met with co-defendant Moulton at a Belfast restaurant and discussed their upcoming cases. According to Colson, Perley Moulton Jr. formulated

plans at that meeting to kill witness Gary Elwell and discussed a method to accomplish this. On November 9 and 10, Mr. Colson met with Chief Keating and State Police Investigator Rexford Kelley and gave a detailed statement about his and other people's involvement in the thefts for which he was under indictment, and told the investigators of Moulton's plan to do away with at least one witness, and threaten others. In order to monitor the anonymous threatening calls and to learn more about Moulton's plans to kill or threaten witnesses, Chief Keating, with Colson's consent, attached a recording device to Colson's telephone. After a third phone call in which Mr. Moulton, who was residing in New Hampshire at the time, told Mr. Colson of his plans to come to Belfast to see Mr. Colson, Keating and Kelley, with

Colson's permission, attached a listening device, a so called "body wire", to Colson in order to surreptitiously listen to their meeting at Colson's trailer. Keating said they did this to protect Gary Colson and to listen to any plans to kill, threaten, or intimidate witnesses. Chief Keating admitted that by this time he was aware that Colson and Moulton would probably discuss their upcoming case at the meeting. Throughout this period of surveillance that produced the three recorded telephone conversations initiated by Perley Moulton Jr., and one recorded "body wire" conversation that defendant seeks to suppress, Colson was told to try to act like himself, converse normally, and avoid trying to draw information out of Moulton.

DISCUSSION

Since a judicial proceeding had been initiated by indictment against defendant Perly [sic] Moulton Jr. long before Moulton participated in the questioned conversations with codefendant Colson, this was a "critical stage" of the prosecution at which the Sixth Amendment right to the assistance of counsel attaches U.S. v. Henry, 100 S.Ct. 2183, 447 U.S. 264, 65 L. Ed 2d 115 (1980). The statements that defendant Moulton seeks to suppress were incriminating statements made by the accused to an undisclosed police informant. The Sixth Amendment requires suppression of an accused's post indictment statements made to an undisclosed police informant if the statements had been deliberately elicited from the accused by the State or its agent. Massiah v. U.S., 84 S.Ct. 1199, 377 U.S. 201, 12 L. Ed. 2d 246



(1964). Post indictment statements of an accused made to an undisclosed police informant should be suppressed when the State creates a situation likely to induce a defendant to make incriminating statements without the assistance of counsel. U.S. v. Henry, 100 S.Ct. 2183, 447 U.S. 264, 65 L.Ed. 2d 115 (1980); State v. White, No. 3224 (Me. May 24, 1983).

This Court finds that the three telephone conversations and one "body wire" conversations sought to be suppressed by defendant Moulton were recorded for legitimate purposes not related to the gathering of evidence concerning the crime for which the defendant had been indicted. Testimony shows that the recordings were made in order to gather information concerning the anonymous threats that Mr. Colson had been receiving, to protect Mr.

Colson and to gather information concerning defendant Moulton's plans to kill Gary Elwell. Since the State did not deliberately elicit any statements contained in the recordings that relate to the crimes for which the defendant had already been indicted, and since the State did not create a situation likely to induce the defendant to make incriminating statements without the assistance of counsel, this Court finds no reason to suppress the recording and denies the defendant's motion.

June 14, 1983

s/William E. McCarthy

Just. Sup. Ct.